

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHARLES GREG DAVIS

Defendant/Appellant

Supreme Court No. 2014-TS-00691

VS.

Hinds County Chancery Court No. G2012-1239

STATE OF MISSISSIPPI

Plaintiff/Appellee

**BRIEF OF APPELLANT
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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

No. 2014-TS-00691

Charles Greg Davis v. State of Mississippi

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

This Court should grant oral argument because the issues raised in this appeal concern substantial issues of law regarding the scope of Mississippi Code Annotated Section 31-7-57. Dispositive issues have not been authoritatively decided on all issues, including whether a Mayor who has not voted to approve an expenditure can be liable under Section 31-7-57(1) and what constitutes actual loss for an unlawful expenditure from a budgeted fund under Section 31-7-57(3).

STATEMENT OF THE ISSUES

- I. WHETHER THE CHANCERY COURT ERRED BY FINDING THAT DAVIS SHOULD REPAY \$90,579.09 IN TOURISM FUNDS UNDER *NICHOLS V. PATTERSON* AND MISSISSIPPI CODE ANNOTATED SECTION 31-7-57.**
- II. WHETHER THE CHANCERY COURT ERRED BY FINDING THAT DAVIS SHOULD REPAY \$25,269.52 FOR TRAVEL EXPENSES ON HIS PERSONAL CREDIT CARD.**
- III. WHETHER THE CHANCERY COURT ERRED BY FINDING THAT DAVIS SHOULD REPAY FOR HIS COUNSELING AT PSYCHOLOGICAL COUNSELING SERVICES.**
- IV. WHETHER THE CHANCERY COURT ERRED BY FINDING THAT DAVIS SHOULD REPAY \$5,951.96 FOR EXPENSES ON THE CITY'S CREDIT CARD.**
- V. WHETHER THE CHANCERY COURT ERRED BY FINDING THAT DAVIS SHOULD REPAY HIS EXPENSES FOR MILEAGE REIMBURSEMENT.**
- VI. WHETHER THE CHANCERY COURT ERRED BY FINDING THAT DAVIS'S COUNTERCLAIMS WERE WITHOUT MERIT.**

STATEMENT OF THE CASE

Nature of the Case

This case concerns the liability of a public official as well as the State Auditor's exercise of his statutory authority under Mississippi Code Annotated Section 7-7-211. Specifically, the State Auditor made written demand to Charles Gregory Davis ("Davis" or "Mayor Davis"), then Mayor of Southaven, for repayment of public funds. Davis refused to pay the demand in full, and the State Auditor sued Mayor Davis seeking to establish personal liability against him under Mississippi Code Annotated Section 31-7-57.

Course of Proceedings

On August 3, 2012, the State Auditor filed its Complaint against Davis in the First Judicial District of the Chancery Court of Hinds County, Mississippi.¹ The Complaint alleged that Davis purposefully turned in invoices without receipts to the City of Southaven for personal expenses to receive money to which he was not entitled.² The State Auditor's Complaint sought reimbursement of \$73,915.27.³

On August 7, 2012, the State Auditor attended a meeting of the City of Southaven and delivered a demand on the City of Southaven to withhold Davis's salary without a judicial finding under Mississippi Code Annotated Section 7-7-43(1).⁴ The basis for this withholding was that Davis was alleged to be a debtor of the State and the City.⁵

¹ Vol. 1 at 000001.

² Vol. 1 at 000001.

³ Vol. 1 at 000001.

⁴ Ex. 23, Demand Letter.

⁵ Ex. 23.

On August 14, 2012, Davis filed Defendant's Answer, Affirmative Defenses, and Counterclaims.⁶ On January 28, 2013, the Court granted Davis's Motion to Amend Counterclaims, and Davis amended his counterclaims to include unjust enrichment, replevin, and recoupment.⁷

On March 13, 2013, Davis filed a Motion for Partial Summary Judgment, arguing that as a matter of law Davis had complied with Mississippi Code Annotated Section 25-3-41 and that all of his expenditures were approved by the Board of Alderman on the minutes and as appropriated in the budget.⁸ The Chancery Court denied Davis's Motion for Partial Summary Judgment.

After several days of trial,⁹ both parties submitted proposed Conclusions of Law and Findings of Fact.¹⁰ The Court issued its opinion on May 20, 2014, in favor of the State Auditor on all issues.¹¹ On May 20, 2014, Davis timely appealed to this Court, seeking review of the Chancery Court's ruling.¹²

⁶ Vol. 1 at 000102.

⁷ Vol. 1 at 000102, 000111. The City of Southaven was added as party but dismissed shortly thereafter.

⁸ Vol. 1 at 000118.

⁹ Trial was held at three different periods: January 28-29; May 14-17, and October 16, 2013.

¹⁰ Vol. 5 at 000567, 000569, 000614.

¹¹ Vol. 4 at 000543.

¹² Vol. 1 at Docket Sheet p. 14; R.E. 1.

STATEMENT OF FACTS

A. Plaintiff State Auditor's Investigation and Demands

The City of Southaven functions under a code charter form of governance, referred to as the mayor-board of aldermen form.¹³ The mayor presides over all meetings of the board of aldermen but board members alone may present motions and cast votes, except in cases where there is a tie.¹⁴ Davis served as Mayor of Southaven from July 1997 until July 2013.¹⁵ As Mayor, Davis spent his own money and sought reimbursement from the City from budgeted funds.¹⁶ The State Auditor sought recoupment \$170,782.28 paid to Mayor Davis by the City of Southaven from 2009 to 2011.¹⁷

Beginning in June or July of 2010, Aldermen Ronnie Hale, Greg Guy, William Brooks, and George Payne began to research Mayor Davis's expenses before approval of the docket each month because they had questions about his expenditures.¹⁸ After convincing themselves that Mayor Davis's expenditures were legitimate, they and the remaining Board members approved each of Mayor Davis's expenditures.¹⁹ Aldermen Hale testified that he would review the docket, and if he had any questions regarding Mayor Davis's expenditures, he would question Mayor Davis or other City employees about them.²⁰ He would also at times have Ms. Heath, the city clerk, pull documentation of the expenditures for him.²¹ Alderman Hale testified that he received all backup documentation with which to review the expenses.²²

¹³ Miss. Code Ann. Sections 21-3-1 through 21-3-25.

¹⁴ *Id.*

¹⁵ Vol. 11 at 702.

¹⁶ Vol. 11 at 702-703.

¹⁷ Ex. 34.

¹⁸ Vol. 7 at 195, 201-02, 225; Ex. 21; R.E. 3, Stipulation.

¹⁹ Vol. 7 at 195, 201-02, 225; Ex. 21; R.E. 3, Stipulation.

²⁰ Vol. 7 at 202.

²¹ Vol. 7 227-232, 240-241.

²² Vol. 7 at 232-233.

In March 2011, the State Auditor's investigation of Davis began with a complaint after Davis and his now ex-wife Suzanne Davis had attended counseling at Psychological Counseling Services (PCS) in Scottsdale, Arizona.²³ The Board had approved Davis's PCS travel and training expenditures on the docket.²⁴ After approval, Alderman Guy reviewed a credit card receipt identifying a PCS charge.²⁵ Alderman Guy searched PCS on the internet and questioned Sheila Heath, the City Clerk, and Davis about PCS.²⁶ Mayor Davis informed Alderman Guy that he had attended PCS for stress-related counseling.²⁷ Around March of 2011, Plaintiff State Auditor received a complaint from Alderman Greg Guy regarding Davis's expenditures at PCS.²⁸

Following up with Guy's complaint, Karen Swain, an investigator with the State Auditor's Office, began meeting with members of the Board of Aldermen and Ms. Heath.²⁹ As part of her investigation, Ms. Swain requested documentation, including invoices and checks, from Ms. Heath regarding PCS.³⁰ She also received Davis's invoices submitted for reimbursement of his monthly expenditures.³¹

As part of her investigation, Swain met with Davis and requested that Davis provide receipts for his expenditures and his personal credit card statements.³² Davis provided his credit card statements but redacted personal expenditures.³³ Davis was unable to comply with the State Auditor's request to generate receipts for all expenditures made years earlier.³⁴ Davis had to

²³ Vol. 6 at 17; Vol. 8 at 294.

²⁴ Vol. 6 at 49, 91.

²⁵ Vol. 6 at 49.

²⁶ Vol. 6 at 49.

²⁷ Vol. 6 at 49.

²⁸ Vol. 8 at 294.

²⁹ Vol. 8 at 294-296.

³⁰ Vol. 8 at 297.

³¹ Vol. 8 at 297-298.

³² Vol. 8 at 301-302.

³³ Vol. 8 at 302.

³⁴ Vol. 8 at 304.

approach vendors and request receipts.³⁵ Given the passage of time, the majority of vendors could not reproduce receipts, so Davis provided as many as he could.³⁶

Upon receipt of the personal credit card statements from Davis, Swain attempted to reconcile Davis's credit card expenditures with Davis's invoices to the City.³⁷ The State Auditor had also informed Davis not to provide any information regarding cash expenditures. Davis had regularly used cash to pay for certain traditionally cash-paid expenses, such as tipping servers and paying for musical bands at yearly City of Southaven meetings and conferences.³⁸ Given that no cash expenditures were included and that Davis was attempting to recall years later which expenditures on the personal credit card statement were City expenditures, the amount of Davis's monthly city reimbursement did not match the total cost of his identified monthly credit card expenditures.³⁹

By letter, Swain requested Davis to provide "a business explanation, [for each expenditure on his personal credit card statement] including the date of the event, why the event occurred, who was there, and the purpose of the expenditure."⁴⁰ Davis provided an excel spreadsheet that contained a listing of every business transaction he could recall on his Capital One card with a description of the expense.⁴¹ In generating this spreadsheet, Davis used his calendar to determine, for instance, which local businessmen he had entertained at certain restaurants in Southaven or which City conferences he had attended at the time.⁴² The credit card statements themselves verified Davis's location when he was making the expenditure and provided as much information

³⁵ Vol. 11 at 702-704.

³⁶ Vol. 11 at 707.

³⁷ Vol. 8 at 301-302.

³⁸ Vol. 8 at 303; Vol. 11 at 830.

³⁹ Vol. 8 at 302.

⁴⁰ Vol. 8 at 303; Ex. 27 at OSA 602.

⁴¹ Vol. 8 at 303; Vol. 11 at 705.

⁴² Vol. 11 at 719.

as a receipt provides.⁴³ When presenting this information to the State Auditor, Davis explained that these expenditures had been made earlier and that he had done his best to determine which expenditures were indeed related to City business.⁴⁴ Upon review of the invoices and Davis's explanations for his personal credit card statements, Agent Swain and Agent Ben Norris focused their investigation on Davis's expenditures on his personal credit card in Key West, Florida; Scottsdale, Arizona; and Los Angeles, California.⁴⁵

After investigating Davis's personal credit card expenditures and PCS, the State Auditor made his first demand against Davis, contending that Davis's personal credit card and PCS expenditures were not proper under Mississippi Code Annotated Section 25-3-41.⁴⁶ Plaintiff State Auditor's initial \$170,782.28 demand against Davis consisted of \$128,642.59, which included all purchases Davis had ever submitted for reimbursement on his personal credit card.⁴⁷ This demand also included two direct payments made to PCS for \$8,410 and \$12,108 as well as \$4,428.19 in PCS charges to Davis's City credit card.⁴⁸ The Auditor also demanded \$16,822.14 in interest and \$13,571.18 for investigative costs.⁴⁹

After the initial demand, the Auditor reduced the amount against Davis. First, the Auditor reduced the demand by \$13,199.82, which represented the costs of Ms. Davis's counseling at PCS.⁵⁰ Second, after Davis provided some receipts, the Auditor gave Davis credit for \$10,319.26 in charges on his personal credit card.⁵¹

⁴³ Ex. 27.

⁴⁴ Ex. 64.

⁴⁵ Vol. 8 at 302, 423, 471.

⁴⁶ Ex. 34.

⁴⁷ Ex. 34.

⁴⁸ Ex. 34; Ex. 85.

⁴⁹ Ex. 85.

⁵⁰ Ex. 34; Ex. 85 at OSA 968.

⁵¹ Ex. 85, at OSA 964.

About April 2011, the State Auditor also reviewed Davis's expenditures on the City credit card.⁵² According to Alderman Guy, the State Auditor's Office requested the Board to meet and determine whether Mayor Davis's \$130,436.52 worth of City card expenditures was related to City business.⁵³ The Board approved all of Mayor Davis's expenditures on the City credit card when they were presented monthly on the official City docket.⁵⁴ At the State Auditor's request, the Board reviewed them a second time and approved them again.⁵⁵ After further request by the Plaintiff State Auditor, the Board met yet again to discuss Mayor Davis's City credit card expenditures.⁵⁶ During this meeting, Alderman Guy informed the Board that if it turned in zero dollars, the State Auditor was going to demand the full amount from them and that he was not willing to pay \$16,500 or his portion.⁵⁷ Alderman Huling also testified that he felt outside pressure to come back with at least some number of purported illegitimate expenditures.⁵⁸ At this closed meeting, the Board decided that it could not ascertain whether \$5,951.96 was or was not related to City business, but did not rescind its approval of payment.⁵⁹ Plaintiff State Auditor never requested the Board to review Mayor Davis's expenses on his personal card, and the Board never rescinded its approval of Davis's expenditures on the personal credit card on the minutes.⁶⁰

Around August 2011, after receiving the first demand letter from the State Auditor, Mayor Davis under threat of suit paid \$96,000 dollars to State Auditor.⁶¹ During the investigation, Davis had only been able to provide \$45,348.90 in receipts.⁶² Davis believed that his \$96,000 payment

⁵² Ex. 24, 25.

⁵³ Vol. 7 at 101-102, 104-105.

⁵⁴ Ex. 21; R.E. 3, Stipulation.

⁵⁵ Vol. 7 at 108-109; Ex. 17, March 3, 2012 Minutes.

⁵⁶ Vol. 8 at 283.

⁵⁷ Vol. 11 at 802; Vol. 8 at 283-284.

⁵⁸ Vol. 11 at 802; Vol. 8 at 283-284.

⁵⁹ Ex. 8, March, 26, 2012 Minutes; Ex. 7, City Attorney Letter.

⁶⁰ Vol. 8 at 803.

⁶¹ Vol. 9 at 473.

⁶² Vol. 12 at 947; Ex. 50, 80.

would resolve the Auditor's demand against him.⁶³ The \$96,000 represented the dollar amount for which Davis was unable to produce receipts.⁶⁴

Despite Davis's \$96,000 payment, the State Auditor's investigation continued with Agent Swain collecting the documents Davis submitted in connection with his requests for mileage reimbursement.⁶⁵ In total, the City had reimbursed Davis \$37,316.99 for mileage.⁶⁶ The State Auditor elected to seek reimbursement of 12% of Davis's mileage reimbursement.⁶⁷ The total mileage demand was \$4,477.92.⁶⁸

After concluding its investigation, the Auditor made a second demand.⁶⁹ In addition to the items included on the initial demand, the second demand sought reimbursement for mileage and City credit card expenditures, less Davis's previous payments:

<u>Description:</u>	<u>Expense:</u>
Personal Credit Card (Key West, Florida at \$6,493.00) (Los Angeles, California \$3,812.78) (PCS Travel, July \$2,710.93) (PCS Travel, August \$76.99) (PCS Payment, July \$6,467.00)	\$118,323.35
PCS direct payments	\$8,410.00
	\$12,108.00
Travel related to PCS on City Credit Card	\$4,428.19
Arizona Per Diem for PCS	\$603.50
City Credit Card	\$5,951.96
Mileage	\$4,477.92
Interest	\$15,240.89
Investigative Costs	\$13,571.18

⁶³ Vol. 12 at 947.

⁶⁴ Ex. 80.

⁶⁵ Vol. 8 at 337.

⁶⁶ Ex. 30; Vol. 8 at 337.

⁶⁷ Ex. 30.

⁶⁸ Ex. 35, 85.

⁶⁹ Ex. 35.

Total	\$183,114.99
Less Amounts repaid by Davis	\$13,199.82
	<u>\$96,000.00</u>
Demand⁷⁰	\$73,915.17

Davis made no further payments to the State Auditor who sued Davis to recover \$73,915.17.⁷¹

Davis counterclaimed seeking recoupment of the \$96,000 he had paid to Plaintiff State Auditor as a result of the Auditor's demands and his mistaken belief that his payment would end the investigation against him so far as the lack of receipts was concerned.⁷²

B. Davis's Board-Authorized Authority to Expend City Funds

During the years 2009, 2010, and 2011, in accordance with State law, the City of Southaven Board of Alderman appropriated funds in each City budget for travel, training, and tourism.⁷³ Under House Bill 1618, the Board set aside \$48,000 for Davis's tourism budget.⁷⁴ Once appropriated in the budget, Davis spent tourism funds for the promotion of the City of Southaven on tourism-related business during the time period relevant to this case.⁷⁵ As addressed herein, House Bill 1618 permits the expenditure for tax collected dollars for tourism-related expenditures.⁷⁶ Mayor Davis used the tourism money when entertaining business prospects and conducting business on behalf of the City of Southaven.⁷⁷

The Board of Aldermen also appropriated \$25,000 each year for Davis's travel and training budget.⁷⁸ The Board did not pre-approve Davis's travel as the Board had delegated this authority to the Mayor's Office.⁷⁹ The Employee Handbook for the City of Southaven, which was first

⁷⁰ Vol. 8. at 368; Ex. 35, 85.

⁷¹ Vol. 8. at 368; Ex. 35, 85.

⁷² Vol. 1 at 000102, 000111; Vol. 12 at 947;

⁷³ Ex. 76, 79, 81.

⁷⁴ Vol. 7 at 101.

⁷⁵ Vol. 7 at 138.

⁷⁶ Ex. 70; R.E. 4, House Bill 1618.

⁷⁷ Vol. 7 at 250.

⁷⁸ Ex. 76, 79, 81.

⁷⁹ Vol. 6 at 76-78; Vol. 7 at 164-166.

adopted on the minutes in 1998, granted the Mayor's Office the authority to establish travel policies.⁸⁰ Subsequent Boards continued to abide by and operate under this provision in the Employee Handbook until it was amended in 2012.⁸¹

Aldermen Guy and Hale were both questioned regarding the practice and procedure for travel approval.⁸² These Aldermen testified that Mayor Davis approved his own travel in accordance with City policy and procedure.⁸³ After Davis had pre-approved his travel under the Board's delegation and within the travel budget, the Board reviewed and approved payment of Davis's travel expenditures on the claims docket.⁸⁴ Alderman Randall Huling served for sixteen years on the Board.⁸⁵ Like Aldermen Guy and Hale, Dr. Huling confirmed that the Board had operated in accordance with the Employee Handbook permitting the Mayor's Office to establish travel policies and that Davis pre-approved his own travel.⁸⁶

In accordance with established City policy, Chris Wilson, the City Administrator, pre-approved travel for municipal employees as necessary but not elected officials.⁸⁷ Additionally, he did not receive travel vouchers for per diem from elected officials or Mayor Davis:

Q It was not your role to approve the travel of the Mayor, was it?

....

A It was never my understanding that I was to approve the Mayor's travel as – as policy.

Q Okay. And, in fact, you didn't approve the travel of any elected official, did you?

A Not to my knowledge no.⁸⁸

⁸⁰ *Id.*

⁸¹ Vol. 9 540, Ex. 9.

⁸² Vol. 6 at 77-78; Vol. 7 164-166.

⁸³ Vol. 6 at 77-78; Vol. 7 164-166.

⁸⁴ See Miss. Code § 21-39-17; Ex. 21; R.E. 3, Stipulation.

⁸⁵ Vol. 11 at 790.

⁸⁶ Vol. 11 at 794.

⁸⁷ Vol. 9 at 507-508.

⁸⁸ Vol. 9 at 534.

Rather, Ms. Heath testified that it was the policy of the City of Southaven for her to fill out travel vouchers for Mayor Davis and other elected officials for per diem.⁸⁹ Aldermen Hale and Huling confirmed that this was the procedure.⁹⁰ Ms. Heath filled out Alderman Huling's voucher for per diem.⁹¹ Ms. Heath also testified that it was the normal practice of the City not to require elected officials to submit receipts when receiving per diem.⁹²

Davis also had Board authority to receive reimbursement for miles traveled in furtherance of his mayoral duties.⁹³ In 1997, during the first year and a half of Davis's term, an investigator from the State Auditor's Office called Davis and informed him that people were complaining about him driving a City car to church on Sundays.⁹⁴ The investigator informed Davis that he "needed an official action of the board to clarify when and where [Davis] was supposed to be at work and what [he] was to be doing and how [he] was to be traveling."⁹⁵

In response, on November 16, 1999, the Board of Aldermen adopted a Resolution Concerning the Duties of the Mayor.⁹⁶ This Resolution explained that Mayor Davis was to act as the mayor at all times and specifically states that "the Mayor at all times whether within or without the city limits of Southaven is in constant promotion of our city" and "shall at all times when traveling within our city be aware of situation which may require the attention of the municipality."⁹⁷ Mayor Davis had the duty of examining roadways and City business at all times

⁸⁹ Vol. 10 at 581-582.

⁹⁰ Vol. at 161, 804.

⁹¹ Vol. 11 at 804.

⁹² Vol. 10 at 612.

⁹³ Ex. 13

⁹⁴ Vol. 12 at 887-889.

⁹⁵ Vol. 12 at 889.

⁹⁶ Ex. 13; Vol. 12 at 888-890.

⁹⁷ Ex. 13; Vol. 12 at 888-890.

when he was traveling within the City but did not seek mileage reimbursements for personal trips.⁹⁸ At the time of the Resolution, Davis was driving a City of Southaven car.⁹⁹

In 2009, based on economic concerns, Davis began to drive a personal vehicle, instead of a City-owned vehicle.¹⁰⁰ Driving in a personal vehicle, Davis began to receive mileage reimbursement for his travel within the City of Southaven.¹⁰¹ To the extent Davis traveled in furtherance of his official duties, Davis received mileage reimbursement.¹⁰²

C. City of Southaven Reimbursement Procedure

To receive reimbursement for his travel, training, and tourism expenditures, Mayor Davis submitted invoices to Ms. Heath.¹⁰³ On a monthly basis, when Mayor Davis's personal credit card statement arrived, he reviewed his monthly charges and invoiced the City of Southaven for those charges related to City business.¹⁰⁴ The Board of Aldermen did not require a copy of the personal credit card statement to accompany the invoice submitted by Mayor Davis, so he maintained these in the Mayor's Office at City Hall.¹⁰⁵

In addition, when the monthly City card statement arrived in the City mail, Ms. Heath had access to the City credit statements and presented them to Mayor Davis to designate the charges he had made on the City card.¹⁰⁶ Ms. Heath testified that the City had multiple city credit cards with the same number for a period of time.¹⁰⁷ Mayor Davis identified his charges on the City credit card by writing on the credit card statement next to his charges the character of his expenditures

⁹⁸ Ex.13.

⁹⁹ Vol. 11 at

¹⁰⁰ Vol. 12 at 891.

¹⁰¹ Vol. 12 at 891.

¹⁰² Vol. 12 at 891; Vol. 11 at 797.

¹⁰³ Vol. 12 at 891; Vol. 11 at 797.

¹⁰⁴ Vol. 11 at 702-704.

¹⁰⁵ Vol. 9 at 440.

¹⁰⁶ Vol. 9 at 548-549; Ex. 29, Bancorp South Invoices.

¹⁰⁷ Vol. 9 at 549; Vol. 10 at 590, 611.

as travel, training, tourism or any other City business expense.¹⁰⁸ According to Ms. Heath, Mayor Davis categorized the expenditures for the budget, and the Board approved payment of these expenditures on the minutes.¹⁰⁹ These City card statements were maintained by Ms. Heath in the City Hall offices.¹¹⁰ They were not attached to the docket.¹¹¹

For mileage reimbursement, Davis documented his total miles traveled during the month, including his beginning and ending mileage.¹¹² Upon receipt of Davis's mileage documentation for the month, Ms. Heath generated a claim for the docket.¹¹³ The Board approved each of Davis's mileage reimbursement requests on the claims docket.¹¹⁴

D. Davis's Expenditures at Psychological Counseling Services

Included in the State Auditor's \$128,642.59 demand from Davis's personal credit card were charges Davis made at PCS.¹¹⁵ In July 2010, for travel to PCS, Davis billed the City \$2,710.93.¹¹⁶ In August, he submitted a bill of \$76.99. And in July, he billed \$6,467.00.¹¹⁷ Davis also made two direct payments to PCS, totaling \$20,518.00.¹¹⁸ A portion of this direct payment included charges for Ms. Davis's treatment, and Davis repaid the City \$13,199.82 for Ms. Davis's counseling.¹¹⁹ He also incurred \$4,428.19 on his City credit card, and \$603.50 for per diem in Arizona.¹²⁰ The total amount sought by the Auditor for PCS is \$21,604.79.¹²¹

¹⁰⁸ Vol. 9 at 548-549; Vol. 10 595-596; Ex. 29.

¹⁰⁹ Vol. 10 at 595-596; Ex. 21; R.E. 3, Stipulation.

¹¹⁰ Vol. 9 at 550-552.

¹¹¹ Vol. 10 at 551.

¹¹² Ex. 30.

¹¹³ Vol. 9 at 550.

¹¹⁴ Ex. 21; R.E. 3, Stipulation.

¹¹⁵ Ex. 85.

¹¹⁶ Ex. 35.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Ex. 85.

¹²⁰ Ex. 35.

¹²¹ Ex. 85.

Mayor Davis and Ms. Davis both testified regarding their experiences at PCS. Mayor Davis testified that he attended PCS for stress counseling.¹²² Specifically, Davis testified that he needed stress counseling given his wife's recent suicide attempt, his sexuality, and his inability to separate his own identity from his identity as Mayor of Southaven.¹²³

Ms. Davis's suicide threats had precipitated Ms. Davis and Mayor Davis's attendance at PCS.¹²⁴ Ms. Davis informed that she and Mayor Davis spent the first two days together at PCS and that Mayor Davis was not present during two weeks of Ms. Davis's individual therapy.¹²⁵ After Ms. Davis left PCS, Mayor Davis returned for individual counseling sessions.¹²⁶ Ms. Davis testified that PCS's counselors included not only marriage and family therapists but also general psychologists and that she received two weeks of intense counseling without Mayor Davis present.¹²⁷

The State Auditor had sought recoupment of the PCS funds from Davis based on the assumption that his time there was for marriage counseling.¹²⁸ The PCS documentation at trial, including brochures and course descriptions, established that PCS offered a variety of treatments, including stress counseling.¹²⁹ On cross-examination, despite the State Auditor's position that Davis had attended PCS for marriage counseling, Agent Norris admitted that Mayor Davis could have received counseling related to stress management at PCS based on his review of PCS documentation:

Q. Anxiety, trauma, abuse issues, depression, all of those are therapies that are offered by the individuals listed that have resumes here, aren't they?

A. That's correct.

Q. It is not just family therapy, is it?

¹²² Vol. 11 at 758, 842-43.

¹²³ Vol. 11 at 758-759, 842-843.

¹²⁴ Vol. 6 at 35.

¹²⁵ Vol. 6 at 37, 40, 41.

¹²⁶ Vol. 6 at 41.

¹²⁷ Vol. 6 at 44-45.

¹²⁸ Vol. 1 at 000004.

¹²⁹ Ex. 65.

A. No sir. It is wide range of addictions and abuses and so forth.

Q. Right. It is certainly not a reasonable conclusion that if someone went to PCS for therapy that the only thing they could have gone there for would have been marital counseling, is it?

A. I wouldn't think so. Be other things.¹³⁰

Alderman Guy testified that he searched PCS on the internet and questioned Ms. Heath and Mayor Davis about PCS.¹³¹ Mayor Davis informed Alderman Guy that he had attended PCS for stress related counseling.¹³² Alderman Guy confirmed that the City has a counseling program available to City employees and that he would expect Mayor Davis to seek treatment for stress related problems preventing Mayor Davis from properly performing his job.¹³³ He also confirmed that the PCS documentation describing the courses offered by PCS did not contain any mention of marriage counseling and “deal[t] with a lot of emotional stuff, anger, that type of thing, tension.”¹³⁴ Alderman Guy's main concern was that the PCS expenditures exceeded Mayor Davis's travel budget.¹³⁵ On cross-examination, Alderman Guy admitted that the City Administrator had the power to move money from one fund to another fund in order to avoid budget shortfalls.¹³⁶ The 2010 budget reflected that the Mayor's Office stayed within its budget.¹³⁷

Dr. Huling also testified that Davis's time spent at PCS was a proper expenditure.¹³⁸ After the Board had approved reimbursement of Davis's PCS expenses on the docket, Alderman Guy approached Alderman Huling and expressed concern regarding the legitimacy of these expenditures.¹³⁹ Consequently, Alderman Huling conducted his own investigation to determine

¹³⁰ Vol. 10 at 687-688; Ex. 65, PCS Documents.

¹³¹ Vol. 6 at 49.

¹³² Vol. 6 at 54.

¹³³ Vol. 6 at 84-85, 93-94.

¹³⁴ Vol. 6 at 87-88.

¹³⁵ Vol. 6 at 53-54.

¹³⁶ Vol. 6 at 90.

¹³⁷ Vol. 11 at 824.

¹³⁸ Vol. 11 at 797.

¹³⁹ Vol. 6 at 49.

whether PCS was a legitimate expenditure.¹⁴⁰ Dr. Huling called PCS, familiarized himself with the PCS courses, and determined “that those sessions indeed would be consistent with courses handling stress and being able to handle stress and improve outlook and being overwhelmed.”¹⁴¹ Dr. Huling confirmed that the general psychologists at PCS could provide counseling on stress and anxiety and that Davis’s treatment at PCS benefitted the City of Southaven because it enabled Davis “to function at maximum effectiveness.”¹⁴²

After trial addressing Davis’s travel, training, and tourism expenditures, the Chancery Court found Davis was personally liable for all expenditures.

¹⁴⁰ Vol. 11 at 798.

¹⁴¹ Vol. 11 at 799.

¹⁴² Vol. 11 at 818.

SUMMARY OF THE ARGUMENT

Under *Nichols v. Patterson*, the Chancery Court held Davis liable for all of his tourism expenditures from 2009 to 2011 based on the Board's alleged failure to properly approve Davis's expenditures on the minutes. Specifically, the Chancery Court found Davis liable because the Board had approved Davis's expenditures on the docket without any discussion of Davis's expenditures. The Chancery Court's ruling misapplies the undisputed facts of this case to *Nichols* and is inconsistent with Mississippi Code Annotated Section 31-7-57(1) and (3), the statute establishing personal liability for public officers.

Second of all, the Chancery Court found Davis liable for \$5,951.96 worth of charges on the city credit card. The Chancellor reasoned that the charges had not been approved. The evidence at trial clearly established, however, that the Board had approved these charges years earlier and never rescinded approval of these claims. Rather, after pressure from the State Auditor, the Board determined that it could not determine, several years later, whether the expenditures were made in furtherance of official city business. The Chancery Court abused its discretion by finding the Board had rescinded its approval and not making additional factual findings as to whether the expenditures were in furtherance of City business.

Third of all, the Chancery Court erred by finding that Davis was liable for his counseling at PCS. In the Board's discretion, the Board determined that Davis's counseling was a benefit to the City and approved payment. This action was not arbitrary nor an illegal donation. Rather, the evidence showed that the Mayor was in need of counseling and received help at PCS. Having a mentally healthy mayor benefitted the City.

Fourth of all, the Chancery Court erred by finding Davis liable for his travel expenditures on his personal credit card. Davis had board-delegated authority to pre-approve his own travel. He stayed within his travel budget, and the Board approved all claims on the docket.

Finally, the Chancery Court erred by finding that Davis was not entitled to receive mileage reimbursement for his travel within the City limits of Southaven. The evidence at trial established that Davis was submitting reimbursement in accordance with the Board's Resolution. The action of the Board in saving the taxpayers' money was not arbitrary nor capricious.

ARGUMENT

This appeal presents questions of law and fact. Davis challenges the Chancellor's legal conclusions as well as certain factual findings. When this Court reviews conclusions of law, it affords the trial judge no discretion; rather, the Court reaches its own conclusions of the applicable law and how it should be applied.¹⁴³ Additionally, statutory interpretation is a matter of law and is to be reviewed *de novo*.¹⁴⁴ "Mississippi jurisprudence does not favor a penalty, and statutory construction of a penal statute will be against the penalty unless provided by clear language."¹⁴⁵

The standard of review employed by this Court for review of a chancellor's decision is abuse of discretion.¹⁴⁶ If substantial evidence exists to support the chancellor's finding of fact, broad discretion is afforded his determination.¹⁴⁷

I. THE CHANCERY COURT ERRED BY FINDING THAT DAVIS SHOULD REPAY \$90,579.09 IN TOURISM FUNDS UNDER *NICHOLS V. PATTERSON* AND MISSISSIPPI CODE ANNOTATED SECTION 31-7-57.

Under *Nichols v. Patterson*,¹⁴⁸ the Chancery Court ruled that Davis was liable for his tourism expenditures because of the Board's failure to act with specificity on the minutes when approving the claims docket:

The invoices were placed on the claims docket and approved by the Board of Alderman in the City's official minutes with hundreds of other claims. However, without any documentation itemizing the expenses and identifying the business purpose for each charge, the Board lacked the ability to determine whether any of the claimed expenditures actually served to promote tourism in the City....The Mississippi Supreme Court has noted that similar municipal expenditures must be based upon a "decision by the governing authorities ... spread on the minutes of the municipality suggesting the purpose" and "appropriately to document why the Board and Mayor determined to spend the tax payers' money as it did." *Nichols v. Patterson* 678 So. 2d 673 (Miss. 1996). The Mississippi Supreme Court determined that a city may not legally expend public funds on tourism promotion in the absence

¹⁴³ *Joel v. Joel*, 43 So. 3d 424 (Miss. 2010).

¹⁴⁴ *Akins v. Mississippi Dept. of Revenue*, 70 So. 3d 204 (Miss. 2011).

¹⁴⁵ *Smith v. Dorsey*, 599 So. 2d 529, 546 (Miss. 1992).

¹⁴⁶ *Church of God Pentecostal, Inc. v. Freewill Pentecostal Church of God, Inc.*, 716 So. 2d 200, 204 (Miss. 1998).

¹⁴⁷ *McEwen v. McEwen*, 631 So. 2d 821, 823 (Miss. 1994).

¹⁴⁸ *Nichols v. Patterson*, 678 So. 2d 673 (Miss. 1996)

of at least a “thorough discussion” noted in the city minutes that an expenditure is being made for that purpose. *Id.*¹⁴⁹

In *Nichols*, based on the common law, this Court affirmed the trial court’s finding that the Board of Aldermen for the City of Olive Branch was not authorized to make expenditures not approved by the Board in minutes under Section 17-3-1, regardless of whether the expenditures were for a lawful purpose.¹⁵⁰ “The public officials of Olive Branch chose to expend public funds, without proper authority...”¹⁵¹ when the Board failed to act on the minutes.

In *Nichols*, for instance, the Board did not appropriate any funds in the budget under Section 17-3-1 for the Volunteer Appreciation Dinners and made no specific findings on the minutes that Volunteer Appreciation Dinners would promote the City of Olive Branch.¹⁵² The Board also had no resolution permitting anyone to promote the City.¹⁵³ Certain Board members essentially took money from the coffers of Olive Branch and spent it without any authorization, causing actual loss to the City, regardless of how the money was spent.¹⁵⁴

The holding of liability in *Nichols* is consistent with Mississippi Code Annotated Section 31-7-57(1). The Legislature has established specific rules for personal liability of public officials in Mississippi Code Annotated Section 31-7-57(1) who appropriate money to objects not authorized by law. A public official who

appropriates or authorizes the expenditure of any money to an object not authorized by law, shall be personally liable ... for any actual loss caused by such appropriation or expenditure.... In the case of a governing board of an agency or governing authority, only the individual members of the governing board who voted for the appropriation or authorization for expenditure shall be liable under this subsection.¹⁵⁵

¹⁴⁹ Vol. 4 at 000547-000548; R.E. 2, Court’s Order.

¹⁵⁰ *Nichols*, 678 So. 2d at 679-680.

¹⁵¹ *Id.* at 682.

¹⁵² *Id.* at 675-76.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Miss. Code § 31-7-57(1).

Board members, for instance, can be liable for making an unlawful budget allocation (i.e., to an object unauthorized by law) or by approving payment of a claim from an unlawful budget allocation.¹⁵⁶ In *Nichols*, the board members authorized the expenditure of money to objects not authorized by law.¹⁵⁷ Because the board never acted on the minutes, there was no authorization.¹⁵⁸ Therefore, the individual board members were deemed liable.¹⁵⁹

Under *Nichols*, the Chancery Court found Mayor Davis liable for all of his tourism expenditures (which had previously been appropriated in the budget) based on his finding that the Board had failed to properly approve Davis's expenditures on the minutes.¹⁶⁰ This ruling is inconsistent with the facts of the present case and Mississippi Code Annotated Section 31-7-57.

A. Mississippi Code Annotated Section 31-7-57(1)

To be liable under the plain language of Section 31-7-57(1) and *Nichols* for his tourism expenditures, Davis would have had to appropriate or authorize the expenditure of tourism funds.¹⁶¹ However, unlike the board members in *Nichols*, Davis (as Mayor) could not authorize the expenditure of money or appropriate money.¹⁶² He could also not vote unless there was a tie.¹⁶³

Rather, each year, as required by state law, the Board of Aldermen for the City of Southaven generated its budget and "by resolution, approve[d] and adopt[ed] the budget as finally determined and enter[ed] the same at length and in detail in their official minutes."¹⁶⁴ The Board

¹⁵⁶ *Id.*; see also *Smith v. Dorsey*, 599 So. 2d 529, 544-545 (Miss. 1992) (quoting *Paxton v. Baum*, 59 Miss. 531, 536-37 (1882) (addressing the meaning of objects not authorized by law and stating "[i]f it is appropriated by the board of supervisors to some other object than is authorized by law, members are personally liable for it, unless they voted against such appropriation.")).

¹⁵⁷ *Nichols*, 678 So. 2d 673 at 682.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Vol. 4 at 000547-000548; R.E. 2, Court's Order.

¹⁶¹ Miss. Code Ann. § 31-7-57(1).

¹⁶² Miss. Code Ann. § 21-3-15; Op. Atty Gen 2010-00462, 2010 WL 3562070 ("[A] mayor is given executive powers, not legislative ones. There is no authority for a mayor to make a motion, as he is not a voting members of the board, except in case of tie.").

¹⁶³ *Id.*

¹⁶⁴ See Miss. Code Ann. § 21-35-9 ("The budget as finally determined, in addition to setting out separately each item for which any appropriation of expenditures is authorized to be expended and the fund out of which the same is to be

opted to appropriate in the budget \$48,000 per year for Davis to expend on tourism.¹⁶⁵ Once appropriated, as executive, Davis had the authority to expend the public funds as appropriated from this general fund.¹⁶⁶ The Board, in turn, had a duty to review these claims on the docket and to pay them if lawfully incurred.¹⁶⁷ Having never appropriated, authorized, or voted, Davis cannot be liable under Section 31-7-57(1) as a matter of law. Any issues relating to the Board's appropriation or authorization on the minutes under Section 31-7-57(1) are immaterial to the case against Davis. Davis did not have the authority to speak on the minutes for the Board of Aldermen for the City of Southaven.

Notably, *Nichols* also does not address approval of the Mayor's claims for reimbursement on the docket for items previously budgeted to a general fund and approved by resolution on the minutes. In *Nichols*, the Board spent money on volunteer dinners, and when challenged by the state auditor attempted to justify the expenditures under Section 17-3-1.¹⁶⁸ The time for approval had already passed; there was no previous appropriation.¹⁶⁹ Accordingly, there should have been a meaningful discussion on the minutes to expend money under Section 17-3-1 and subsequent approval of claims on the docket.¹⁷⁰

paid, shall set out the total amount appropriated and authorized to be expended from each fund, the cash balance in the fund at the close of the present preceding fiscal year, the working cash balance necessary for the next fiscal year, the estimated amount, if any, which will accrue to the fund from sources other than taxation for the current fiscal year, and the amount necessary to be raised for each fund by tax levy during the current fiscal year. The governing authorities of the municipality shall then, by resolution, approve and adopt the budget as finally determined, and enter the same at length and in detail in their official minutes.”).

¹⁶⁵ Ex. 76, 79, 81. The State Auditor presented no evidence at trial that the Board's budget allocation was invalid. The Board's discussions regarding budget allocations were not introduced into evidence and were not an issue raised in the State Auditor's Complaint or at trial. Indeed, the State Auditor did not put the minutes for the City of Southaven into evidence.

¹⁶⁶ See Op. Att'y Gen. 2011-00296, 2011 WL 4383408 (citing Op. Att'y Gen. 2010-00636, 2010 WL 5172841 (“[O]nce municipal funds have been allocated via a properly approved municipal budget, such funds may be expended as deemed necessary by the mayor and/or department head, depending upon the allocation.”)).

¹⁶⁷ See Op. Att'y Gen. 2007-00481, 2007 WL 4192047 (“If the mayor requests payment of a claim that was budgeted by the board and lawfully incurred by the municipality, then the claim must be approved for payment by the board of aldermen.”).

¹⁶⁸ *Nichols*, 678 So. 2d at 679-680.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

The reverse occurred in the present case. The Board of Alderman for the City of Southaven approved the expenditure of tourism funds in the budget before Davis ever made an expenditure.¹⁷¹ No statute required Davis to seek further approval before making an expenditure and, ultimately, the form by which the Board approved payment of claims on the docket was permitted by Mississippi Code Annotated Sections 21-39-17 and 21-35-9. To the extent the Board did not review Davis's claims (or any of the other claims presented on the docket) the Board assumed the risk of liability under Section 31-7-57(1).¹⁷² The facts in this case, however, show the Board did review the claims properly and even conducted their own investigation.¹⁷³

B. Mississippi Code Annotated Section 31-7-57(3)

In order for the State Auditor to establish personal liability as to Davis under Section 31-7-57(3), Plaintiff State Auditor had the burden to prove that Davis caused “public funds to be expended...contrary to or without complying with any statute of the State of Mississippi...regulating or prescribing the manner” in which expenditures are made.¹⁷⁴ Upon proof that Davis caused funds to be expended in violation of a controlling statute, Davis is only personally liable “for any actual loss caused by such unlawful expenditure.”¹⁷⁵ Accordingly, the State Auditor had to prove that Davis's reimbursement requests violated a controlling statute (i.e., unlawful expenditure) and that this violation caused the City of Southaven actual loss.¹⁷⁶

Relying solely on *Nichols*, in his Opinion, the Chancellor did not address Section 31-7-57(3) and whether Davis's expenditures violated any statutes or caused actual loss.¹⁷⁷ Rather, the

¹⁷¹ Ex. 76, 79, 81.

¹⁷² See Op. Att'y Gen. 96-0184, 1996 WL 224084 (discussing *potential* liability of board member for approving claim on docket without examining claim presented on the docket).

¹⁷³ Vol. 7 at 195, 201-02, 225; Ex. 21; R.E. 3, Stipulation.

¹⁷⁴ Miss. Code Ann. § 31-7-57(3).

¹⁷⁵ *Id.* Under Section 31-7-57(3), an unlawful expenditure does not automatically result in actual loss to the City. Miss. Code § 31-7-57.¹⁷⁵ See also *Summer v. Denton*, 382 So. 2d 461 (Miss. 1980).

¹⁷⁶ Miss. Code Ann. § 31-7-57(3).

¹⁷⁷ Vol. 4 at 000547-000548; R.E. 2, Court's Order.

Chancery Court found only that Davis did not present the Board with enough documentation to permit the Board to make a meaningful determination that the tourism expenditures were lawfully incurred.¹⁷⁸ As outlined above, the Board's actions are immaterial to a finding of Davis's liability since Davis had no authority to appropriate or authorize the expenditure of public funds.¹⁷⁹

Accordingly, because the Chancery Court's ruling is inconsistent with Mississippi Code Annotated Section 31-7-57(1) and *Nichols*, this Court should reverse the Chancery Court's finding that the State Auditor's exception to Davis's tourism funds was proper.

II. THE CHANCERY COURT ERRED BY FINDING THAT DAVIS SHOULD REPAY \$5,951.96 FOR EXPENSES ON THE CITY'S CREDIT CARD.

Under Section 21-39-27, the State Auditor sought reimbursement for \$5,951.96 worth of expenditures on the City credit card.¹⁸⁰ Mississippi Code Annotated Section 21-39-27 provides that "[a]ny member of the governing authority or municipal employee who uses the credit card to make an expenditure that is not approved for payment by the governing authority shall be personally liable for the expenditure and shall reimburse the municipality."¹⁸¹ This Section also requires card users to submit receipts.¹⁸²

The Chancery Court ruled in favor of the Auditor, finding that Davis did not have authority to make these expenditures and did not turn in receipts:

On March 26, 2012, the Board voted to approve all but \$5,951.96 of those charges. In a letter dated April 6, 2012, the City attorney explained that the Board "concluded it did not possess sufficient information, proof or documentation to establish that the remaining credit card purchases amount to \$5,951.96 were related to City business." Davis failed to provide receipts to the City Clerk for the charges in direct violation of Mississippi Code Ann. § 29-39-27(1). Therefore, Davis is personally liable for all of the expenditures on the City credit card that were not approved by the Southaven Board of Aldermen.¹⁸³

¹⁷⁸ Vol. 4 at 000547-000548; R.E. 2, Court's Order.

¹⁷⁹ Miss. Code Ann. § 21-3-15.

¹⁸⁰ Ex. 85.

¹⁸¹ Miss. Code Ann. § 21-39-27.

¹⁸² *Id.*

¹⁸³ Vol. 4 at 000550-000551.

The Chancery Court's factual finding is clearly erroneous. The Board twice approved Davis's charges and never rescinded its approval.¹⁸⁴ When the monthly City card statement arrived in the City mail, the City clerk had full possession of the City credit statements and presented them to Mayor Davis to designate the charges he made on the City card.¹⁸⁵ Mayor Davis identified his charges on the City credit card by writing on the credit card statement next to his charges the character of his expenditures as travel, training, tourism or any other City business expense.¹⁸⁶ The City clerk categorized the expenditures as necessary for the budget, and the Board approved payment of these expenditures on the minutes.¹⁸⁷

Years later, on March 20, 2012, the Board once again found that the expenditures on the City credit card were related to City business.¹⁸⁸ After outside influence on the Board's independent decision-making authority by the State Auditor, the Board again met privately in an Executive Session to discuss Mayor Davis's expenditures and suddenly reversed course, voting two years after the expenditures that it could not then determine whether \$5,951.96 worth of expenditures was related to City business.¹⁸⁹ Aldermen Huling and Guy both testified that they felt outside pressure to come back with at least some number of illegitimate expenditures or that they would be held personally liable.¹⁹⁰ Alderman Guy informed the Board that if it turned in zero dollars, the State Auditor was going to demand the full amount from them and that he was not willing to pay \$16,500 or his portion.¹⁹¹ At no time did the Board rescind its approval. The Board

¹⁸⁴ Vol. 7 at 108-109, Ex. 17, March 3, 2012 Minutes.

¹⁸⁵ Vol. 7 at 154, 121-22; Ex. 29, City Card Invoices.

¹⁸⁶ Ex. 29.

¹⁸⁷ Ex. 21; R.E. 3, Stipulation; Vol. 7 at 121-22.

¹⁸⁸ Ex. 17.

¹⁸⁹ Ex. 8, 16.

¹⁹⁰ Vol. 11 at 802.

¹⁹¹ Vol. 8 at 283-284.

has not withdrawn their approval of the expenses to this day, but only stated that as of two years after these expenditures were approved, the Board was not certain they were for City business.¹⁹²

Finally, the Chancery Court erred in finding that Davis was liable as a matter of law for not turning in a receipt under Mississippi Code Annotated Section 29-39-27(1).¹⁹³ While Section 29-39-27(1) requires a receipt, it does not address personal liability.¹⁹⁴ Mississippi Code Annotated Section 31-7-57(3) does, providing that Davis is only personally liable for “actual loss” caused by an “unlawful expenditure.” There has been no evidence provided showing that the \$5,951.96 of expenditures were not made in furtherance of business of the City of Southaven or, for that matter, that the charges were even attributable to Davis. Multiple City employees had cards with the same number.¹⁹⁵

In sum, the Chancery Court abused its discretion by ruling that Davis’s City card expenditures were not approved and as a matter of law by not requiring the State Auditor to prove that Davis’s credit card expenditures caused the City actual loss under Mississippi Code Annotated Section 31-7-57(3). Clearly, the Chancery Court never made any independent factual findings as to whether Davis’s expenditures were in furtherance of City business. This exception must be reversed.

III. THE CHANCERY COURT ERRED BY FINDING THAT DAVIS SHOULD REPAY \$25,269.52 FOR TRAVEL EXPENSES ON HIS PERSONAL CREDIT CARD.

The Chancery Court found that Davis was liable under Mississippi Code Annotated Section 25-3-41 for his travel expenditures on his personal credit card because Davis traveled “without having [these expenditures] pre-approved by the Board of Alderman in its minutes.”¹⁹⁶ The

¹⁹² Ex. 8, March 26, 2012, Minutes; Ex. 7, City Attorney Letter.

¹⁹³ Vol. 4 at 000550-000551.

¹⁹⁴ Miss. Code Ann. § 29-39-27(1).

¹⁹⁵ Vol. 10 at 589.

¹⁹⁶ Vol. 4 at 000560.

Chancery Court based his ruling, in part, on his factual finding that the City Handbook did not explicitly grant Davis the authority to pre-approve his own travel. This factual finding was not supported by evidence. And, if even if it were, Davis is not personally liable under Mississippi Code Annotated Section 31-7-57(3) without a finding that this unlawful expenditure caused the City of Southaven actual loss.¹⁹⁷

The Attorney General has explained on numerous occasions that a “board is responsible for approving travel in advance for municipal...employees...If the board chooses to delegate that authority, it must do so by establishing such a policy in the minutes.”¹⁹⁸ On September 9, 2011, the Attorney General confirmed its prior determination that Section 25-3-41 “permit[s] a governing authority to designate in its minutes, by resolution or ordinance, the approval of travel of its officers and employees to the mayor or a municipal department head, provided that a travel expense is included in the annual budget.”¹⁹⁹

During 2009 through 2011, the Employee Policies and Procedures Manual of the City of Southaven delegated to the Mayor of Southaven the authority to approve travel in accordance with applicable state law: “Rules and regulations governing official travel are established in accordance with the Office of the Mayor and applicable state law.”²⁰⁰ On December 1, 1998, Alderman Greg Guy made a motion on the minutes that the Employee Handbook be adopted.²⁰¹ This motion passed unanimously on the minutes, giving the Mayor’s Office the authority to pre-approve travel, including his own travel.²⁰² Nothing prohibits the Mayor from establishing a policy of approving his own travel. The evidence at trial established that this delegation was consistent with the practice

¹⁹⁷ See *Smith v. Dorsey*, 599 So. 2d 529, 545 (Miss. 1992)

¹⁹⁸ Ex. 12, OSA Bulletin No. 2011-09.

¹⁹⁹ Op. Att’y Gen. 2011-00343, 2011 WL 5006017; see also Op. Att’y Gen., 2011-00302, 2011 WL 4383398 (citing Op. Att’y Gen. 1995-0346, 1995 WL 398411)).

²⁰⁰ Ex. 11, Employee Policies and Procedures Manual.

²⁰¹ Ex. 73, Minutes.

²⁰² Ex. 74, Employee Handbook 1999.

of the City of Southaven until the Board opted to amend the Employee Policies and Procedures Manual in 2012.²⁰³ The Chancery Court erred by finding that Davis did not have Board-delegated authority to pre-approve his own travel.

In addition, even if Davis was in violation of Mississippi Code Annotated Section 21-3-41, Davis is not personally liable for his travel expenditures without a showing that he caused the City of Southaven actual loss under Section 31-7-57(3). The City of Southaven had appropriated \$25,000 in its budget for Davis's travel and training. This was a lawful budget allocation to objects authorized by law. In *Smith v. Dorsey*, this Court examined the meaning of authorization or appropriation to objects not authorized by law.²⁰⁴ "It is for a diversion of money from its legitimate objects, and not for appropriation to a proper object, although in an irregular or unauthorized manner, that liability is imposed on members personally."²⁰⁵ Under Section 31-7-57, as interpreted in the common law, Davis cannot be strictly liable for violation of Section 25-3-41.

In *Summer v. Denton*, 382 So. 2d 461 (Miss. 1980), this Court found no "actual loss" for an unlawful expenditure.²⁰⁶ The Board of Supervisors had violated Section 19-13-3 by permitting a Board member's brother-in-law to receive county funds for hauling gravel.²⁰⁷ However, because the Board of Supervisors had authority to expend funds for gravel (i.e., the funds were appropriated to objects authorized by law), the Court found there had been no "actual loss" because the gravel had indeed been delivered and spread on county roads.²⁰⁸ Likewise, once budgeted, Davis had the authority to expend Board-appropriated funds for travel and training.²⁰⁹ The Chancery Court made no findings that Davis's travel and training expenditures were not in furtherance of City business.

²⁰³ Vol. 6 at 76-78, 81; Vol. 7 at 164-166; Ex. 11, 73, 74.

²⁰⁴ *Dorsey*, 599 So. 2d at 544-545.

²⁰⁵ *Dorsey*, 599 So. 2d at 544-545.

²⁰⁶ *Summer v. Denton*, 382 So. 2d 461 (Miss. 1980).

²⁰⁷ *Id.* at 467.

²⁰⁸ *Id.* at 465.

²⁰⁹ Ex. 76, 79, and 81.

Accordingly, the Chancery Court's exception to Davis's travel and training expenditures was improper and must be reversed.

IV. THE CHANCERY COURT ERRED BY FINDING THAT DAVIS SHOULD REPAY FOR HIS COUNSELING AT PSYCHOLOGICAL COUNSELING SERVICES.

"The scope of review is limited when examining the actions of a municipal board."²¹⁰ "For questions of law, a municipal board's decision is reviewed de novo."²¹¹ Additionally, this Court "will not set aside the action of the governing body of a municipality unless such action is clearly shown to be arbitrary, capricious, or discriminatory or is illegal or without substantial evidentiary basis."²¹² "An act is arbitrary and capricious when it is done at pleasure, without reasoned judgment or with disregard for the surrounding facts and circumstances."²¹³ "Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion or more than a 'mere scintilla' of evidence."²¹⁴

The Chancery Court found that although the Board had approved Davis's reimbursement for his counseling at PCS, Davis was personally liable for these reimbursements as they were personal in nature:

The evidence presented at trial clearly established that the counseling received by Davis and his wife at PCS was entirely personal in nature and was wholly unrelated to any City business. The Board's retroactive approval of the payments to PCS are of no consequence as the Board is prohibited from authorizing the expenditure of public money for Davis' personal benefit. *See Golding v. Salter*, 107 So. 2d 348, 356-57 (Miss. 1958); *Nichols*, 678 So. 2d 681.

The Chancery Court abused its discretion by making this factual determination. The Chancery Court cannot "set aside the action of the governing body of a municipality unless such action is

²¹⁰ *Precision Commc'ns, Inc. v. Hinds County, Miss.*, 74 So. 3d 366, 369 (Miss. Ct. App. 2011) (citing *Nelson v. City of Horn Lake ex. rel. Bd. of Aldermen*, 968 So. 2d 938, 942 (Miss. 2007)).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

clearly shown to be arbitrary, capricious, or discriminatory or is illegal or without [a] substantial evidentiary basis.”²¹⁵ Mississippi Code Annotated Section 21-17-5 also grants municipalities discretion in managing municipal affairs. *Nichols*, 678 So. 2d at 681-82 (Home rule statute gives municipalities discretion in managing municipal affairs).

The Board’s approval of Davis’s time at PCS for stress counseling was neither arbitrary nor illegal as a donation. Contrary to the Chancery Court’s ruling, the overwhelming evidence at trial established that the Board approved Davis’s counseling as a travel and training expenditure and that his counseling benefitted not only Davis but also the City of Southaven. Alderman Guy testified that the City of Southaven has since developed a program which allows City employees to partake in counseling services and further testified that his review of the PCS informational documents revealed that PCS offered counseling dealing “with a lot of emotional stuff, anger, that sort of thing, tension” and did not reference marriage counseling.²¹⁶ The City also had a program in place when needed before the Board updated its counseling policy.²¹⁷ Dr. Huling testified specifically that Davis’s time spent at PCS was proper.²¹⁸ After the Board had approved reimbursement of Davis’s PCS expenses on the docket, Alderman Guy approached Alderman Huling and expressed concern regarding the legitimacy of these expenditures.²¹⁹ Consequently, Alderman Huling conducted his own investigation to determine whether PCS was a legitimate expenditure.²²⁰ Dr. Huling called PCS, familiarized himself with the PCS courses, and determined “that those sessions indeed would be consistent with courses handling stress and being able to handle stress and improve outlook and being overwhelmed.”²²¹ Indeed, Dr. Huling confirmed that

²¹⁵ *Precision Commc’ns, Inc.*, 74 So. 3d at 369 (citations omitted).

²¹⁶ Vol. 6 at 87-88.

²¹⁷ Vol. 6 at 85.

²¹⁸ Vol. 11 at 797.

²¹⁹ Vol. 6 at 49.

²²⁰ Vol. 11 at 798.

²²¹ Vol. 11 at 799.

the general psychologists at PCS could provide counseling on stress and anxiety and that Davis's treatment at PCS benefitted the City of Southaven.²²²

Mayor Davis's testimony established his need for stress counseling, given his wife's recent suicide attempt, his sexuality, and his inability to separate his own identity from his identity as Mayor of Southaven.²²³ Indeed, Plaintiff State Auditor's only evidence that Mayor Davis attended marriage counseling was that Ms. Davis also received psychological counseling at PCS with Mayor Davis for two days.²²⁴ Mayor Davis was not part of Ms. Davis's treatment for an entire two week period and much of her treatment concerned her attempted suicide.²²⁵ The evidence further showed that Mayor Davis reimbursed the City of Southaven for Ms. Davis's time at PCS.²²⁶

In sum, the evidence adduced at trial showed that Mayor Davis attended PCS for stress counseling when confronted with difficult personal issues, including his own sexuality and stress incident to his job as Southaven Mayor and his wife's suicide threats.²²⁷ The City of Southaven received a benefit by having Mayor Davis and Ms. Davis attend these sessions, and other City employees have the opportunity to attend counseling as well.

V. THE CHANCERY COURT ERRED BY FINDING THAT DAVIS SHOULD REPAY HIS EXPENSES FOR MILEAGE REIMBURSEMENT.

Plaintiff State Auditor sought repayment of 12% of Mayor Davis's total mileage reimbursements.²²⁸ The Chancery Court found that Davis was personally liable, reasoning that Davis should not have received his total miles traveled per month in the City:

²²² Vol. 11 at 818.

²²³ Vol. 11 at 758-759.

²²⁴ Vol. 6 at 39.

²²⁵ Vol. 6 at 41.

²²⁶ Vol. 8 at 400.

²²⁷ Vol. 11 at 758-759, 842-843.

²²⁸ Mississippi Code Annotated Section 25-3-41 establishes requirements for mileage reimbursements in a privately-owned motor vehicle: (2) When any officer or employee of any county or municipality, or of any agency, board or commission thereof, after first being duly authorized, is required to travel in the performance of his official duties, the officer or employee shall receive as expenses Twenty Cents (20 cents) for each mile actually and necessarily traveled, when the travel is done by a privately-owned motor vehicle; provided, however, that the governing authorities of a

Davis testified that he believed he was always engaged in the performance of his official duties while traveling within the city limits of Southaven and that he was entitled to be reimbursed for one hundred percent of his mileage traveled inside the City, even his commute to and from work. In fact, Davis failed to keep any travel log, or business log....It is obvious to the Court that Davis was not entitled to one hundred percent reimbursement for mileage driven within the city limits in his personal vehicle. It is also clear that the Board was without authority to approve such a mileage reimbursement.

The action of a governing body cannot be set aside “unless such action is clearly shown to be arbitrary, capricious, or discriminatory or is illegal or without [a] substantial evidentiary basis.”²²⁹

The Board’s actions was neither arbitrary nor capricious. Rather, the actions of the Board addressed a prior investigation by the State Auditor and saved the City money.²³⁰ In 1997, during the first year and a half of Davis’s term, an investigator from the State Auditor’s Office called Davis and informed him that people were complaining about him driving a City car to church on Sundays.²³¹ The investigator informed Davis that he “needed an official action of the board to clarify when and where I was supposed to be at work and what I was to be doing and how I was to be traveling.”²³²

In response, on November 16, 1999, the Board of Aldermen adopted a Resolution Concerning the Duties of the Mayor.²³³ This Resolution explained that Mayor Davis was to act as the mayor at all times and specifically states that “the Mayor at all times whether within or without the city limits of Southaven is in constant promotion of our city” and “shall at all times when traveling within our city be aware of situation which may require the attention of the

county or municipality may, in their discretion, authorize an increase in the mileage reimbursement of officers and employees of the county or municipality....in an amount not to exceed the mileage reimbursement rate authorized for officers and employees of the State of Mississippi....²²⁸

²²⁹ *Precision Commc’ns, Inc. v. Hinds County, Miss.*, 74 So. 3d 366, 369 (Miss. Ct. App. 2011) (citations omitted).

²³⁰ Vol. 12 at 887-889.

²³¹ Vol. 12 at 887-888.

²³² Vol. 12 at 889.

²³³ Ex. 13; Vol. 12 at 888-890.

municipality.”²³⁴ The Board’s action in establishing this resolution was not arbitrary. Mayor Davis had the duty of examining roadways and City business at all times when he was traveling within the City and did not seek mileage reimbursements for personal trips.²³⁵ At the time of the Resolution, Davis was driving a City of Southaven car.

In 2009, based on economic concerns, Davis began to drive a personal vehicle, instead of a City-owned vehicle.²³⁶ Driving in a personal vehicle, Davis began to receive mileage reimbursement for his travel within the City of Southaven. Davis was traveling in the performance of his official duties as required by this Resolution.²³⁷ Accordingly, Davis sought reimbursement for his miles when traveling in his personal vehicle and ultimately saved the City money by doing so.²³⁸ Neither the City nor State law required Davis to keep a daily log of his travel. Documentary evidence shows that he did not seek reimbursement for personal trips.²³⁹ Additionally, Davis did not turn in all the mileage he drove within the City.²⁴⁰ Davis used another car for personal trips.²⁴¹ Each month he submitted his total miles traveled for City business, and the Board approved payment on the docket.²⁴²

Davis should not be liable for his mileage reimbursement. The action of the Board was neither arbitrary nor capricious. The City reimbursed Davis for his travel within the City in furtherance of his official duties. Under the Resolution, Davis was at all times when traveling within the City acting in furtherance of City business. Ultimately, this Resolution and Davis’s

²³⁴ Ex. 13.

²³⁵ Ex. 13.

²³⁶ Vol. 12 at 890-891.

²³⁷ Ex. 21; R.E. 3, Stipulation.

²³⁸ Ex. 30; Vol. 12 at 891.

²³⁹ Ex. 30.

²⁴⁰ Vol. 13 at 955.

²⁴¹ Vol. 13 at 956.

²⁴² Ex. 30; Ex. 21; R.E. 3, Stipulation.

switch from a City-owned vehicle to a personal vehicle saved the taxpayers money. Davis requests this Court to reverse the Chancery Court's ruling as to Davis's mileage.

VI. THE CHANCERY COURT ERRED BY FINDING THAT DAVIS'S COUNTERCLAIMS WERE WITHOUT MERIT.

Based on the Chancery Court's findings that Davis was personally liable for all of his expenditures, the chancellor ruled that Davis's counterclaim for recoupment of the \$96,000 paid to the State Auditor was without merit. As outlined above, the Chancery Court erred in its findings that Davis owed the State Auditor under Section 31-7-57(3) and Davis is entitled to recoup the \$96,000 paid to the State Auditor.

Before the Chancery Court, Plaintiff State Auditor argued that Davis's counterclaim for recoupment was barred because Davis paid as a volunteer. The "volunteer" rule is set forth in *McDaniel Bros. Construction Co., Inc. v. Burk-Hallman Co.*, 253 Miss. 417, 175 So. 2d 603 (1965):

(A) voluntary repayment cannot be recovered back, and a voluntary payment within the meaning of this rule is a payment made without compulsion, fraud, mistake of fact, or agreements to repay a demand which the payor does not owe, and which is not enforceable against him, instead of invoking the remedy or defense which the law affords against such demand.

(Emphasis Added.) Contrary to State Auditor's argument, Davis did not pay as a volunteer. Davis paid under legal compulsion. The State Auditor had made two formal demands for payment of money to Davis and was going to take the money from Davis if he did not provide receipts.²⁴³ Indeed, the State Auditor instructed the City of Southaven to withhold Davis's paycheck in satisfaction of his demands.²⁴⁴

Furthermore, Davis was mistaken as to the facts. When Davis made the payment, he believed based on misrepresentations by the State Auditor that the Auditor's investigation against

²⁴³ Vol. 13 at 951.

²⁴⁴ Vol. 8 at 251-252; Ex. 23.

him would be finally resolved.²⁴⁵ The Auditor had demanded receipts from Davis, so Davis paid \$96,000 and did not make payment for expenditures for which he was able to find receipts.²⁴⁶ The principal owed on the first demand was \$153,588.73, without interest and investigative fees.²⁴⁷ Davis paid \$13,199.82 for Ms. Davis's counseling, leaving \$140,388.91 owed in principal on the first demand. Davis provided \$45,348.00 in receipts.²⁴⁸ Accordingly, Davis paid \$96,000, which represents the amount for which he could not provide receipts years later.²⁴⁹ The State Auditor adduced no substantive testimony at trial to refute Davis's testimony. Agent Swain testified that it was her understanding that Davis's payment was a partial payment towards the entire demand; however, Agent Swain further admitted that she turned the file over and the attorneys, not Swain, made demands as to Davis and accepted payment from him.²⁵⁰

Davis is entitled to reimbursement of his \$96,000. He did not pay as a volunteer. Accordingly, Davis respectfully requests this Court to reverse the Chancery Court's ruling that Davis's claim for recoupment was without merit.

²⁴⁵ Vol. 12 at 947.

²⁴⁶ Vol. 12 at 947-951.

²⁴⁷ Vol. 12 at 947-51.

²⁴⁸ Ex. 38.

²⁴⁹ Vol. 12 at 948-951.

²⁵⁰ Vol. 9 at 473-474.

CONCLUSION

Davis is not personally liable for his tourism, travel, or training expenditures. First, the Chancery Court erred by finding that Davis was personally liable for his tourism expenditures. The Chancery Court's ruling misapplies the undisputed facts of this case to *Nichols* and is inconsistent with Mississippi Code Annotated Section 31-7-57(1) and (3), the statute establishing personal liability for public officers. Rather, under Mississippi Code Annotated Section 31-7-57(3), the State Auditor had the burden to prove that Davis caused public funds to be expended in violation of a controlling statute. If established, Davis would be liable "for any actual loss caused by such unlawful expenditure." At trial, the State Auditor never established that Davis violated any controlling statute or caused the City of Southaven any actual loss. Moreover, the Chancery Court did not make any such findings.

Second of all, Davis's charges on the City credit card were approved and paid by the Board on the minutes. The City never rescinded approval of these claims. Rather, the Board determined that it could not determine, several years later, whether the expenditures were made in furtherance of official city business. The Chancery Court abused its discretion by finding the Board had rescinded its approval and not making additional factual findings as to whether the expenditures were in furtherance of City business.

Third of all, the Chancery Court erred by finding that Davis was liable for his counseling at PCS. In the Board's discretion, the Board determined that Davis's counseling was a benefit to the City and approved payment. This action was not arbitrary nor an illegal donation. Rather, the evidence showed that the Mayor was in need of counseling and received help at PCS. A healthy Mayor benefitted the City.

Fourth of all, the Chancery Court erred by finding Davis liable for his travel expenditures on his personal credit card. Davis had board-delegated authority to pre-approve his own travel. He stayed within his travel budget, and the Board approved all claims on the docket.

Finally, the Chancery Court erred by finding that Davis was not entitled to receive mileage reimbursement for his travel within the City limits of Southaven. The evidence at trial show that Davis was submitting reimbursement in accordance with the Board's Resolution. The action of the Board in saving the taxpayers' money was not arbitrary nor capricious.

For these reasons, Davis respectfully requests this Court to reverse the Chancery Court and to remand this cause for a proper determination of the amount the City of Southaven owes Davis in light of his \$96,000 payment.

THIS the 25th day of November, 2014.

Respectfully submitted,

/s/ Michael A. Heilman

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CERTIFICATE OF SERVICE

I, Michael A. Heilman, do hereby certify that I electronically filed the foregoing with the Clerk of the Court using the MEC filing system which sent notification of such filing to the following counsel of record:

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I, Michael A. Heilman, do hereby certify that I have this day delivered a true and correct copy of the above and foregoing document via U.S. Mail, postage prepaid to the following:

Hon. Dewayne Thomas
Hinds County Chancery Court
Post Office Box 686
Jackson, Mississippi 39205-0686

This the 25th day of November, 2014.

/s/ Michael A. Heilman

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